ADDENDUM A

Filed August 31, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1995, 92-1997, 92-1999, 92-2000, 92-2001,
92-2002, 92-2003, 92-2004, 92-2005, 92-2006, 92-2007,
92-2008, 92-2009, 92-2010, 92-2011, 92-2014,
and 92-2016

IN RE: PAOLI RAILROAD YARD PCB LITIGATION

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Argued: October 26, 1993

Before: BECKER, ROTH, and LEWIS, *Circuit Judges.*

(Filed August 31, 1994)

[As Amended October 17, 1994]

OPINION OF THE COURT

BECKER, *Circuit Judge.*

I. INTRODUCTION

The plaintiffs in this toxic tort case have lived for many years in the vicinity of the Paoli Railyard, a railcar maintetenance facility at which polychlorinated biphenyls (PCBs) were used in profusion for over a quarter century. They have sued to recover damages for a variety of physical ailments and for property damage against the corporations that have maintained the railyard and that sold the PCBs.

This appeal is from the district court's second grant of summary judgment for the defendants. In *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) ("*Paoli I*"), *cert. denied*, 499 U.S. 961, 111 S. Ct. 1584 (1991), we reversed the grant of summary judgment for defendants and remanded for further proceedings. We did so because the foundation of the summary judgment—the exclusion of virtually all the plaintiffs' expert opinion pursuant to Federal Rules of Evidence 702, 703 and 403—was undermined by (1) the failure of the district court to permit sufficient development of the record upon which a determination to exclude expert evidence might be based, and (2) the district court's failure to make findings, grounded on Fed. R. Evid. 702 or 703, setting forth the basis of its decision.

On remand the district court conducted five days of *in limine* hearings, receiving extensive evidence about the scientific reliability of plaintiffs' expert opinions. It then filed extensive opinions (totalling 330 pages) setting forth not only findings of fact but also its reasons for again excluding the vast bulk of plaintiffs' expert evidence. This appeal followed.

Resolution of the appeal requires that we address myriad issues of procedure, evidence, and substantive law. Primarily, however, we must consider the voluminous record concerning expert opinion and, applying Fed. R. Evid. 702 and the standard enunciated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), decide whether the district court

erred in again excluding the opinions of plaintiffs' experts in connection with its summary judgment determination. *Daubert* requires the district court to act as "gatekeeper" and to assure that the scientific methodology upon which the expert opinion is founded is reliable, i.e., that the expert's conclusion is based on good grounds (the methods and principles of science). We also must deal with Fed. R. Evid. 703 because the district court's exclusion of expert testimony rests, in part, on its conclusion that some of the hearsay evidence upon which the experts relied is not of a kind usually relied on by experts in the field. In this regard we conclude that the precept announced in *In Re: Japanese Electronics Products Antitrust Litigation,* 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom., Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348 (1986), that the principal arbiters of the reasonableness of reliance upon inadmissible evidence are the experts and not the trial judge, does not survive *Daubert.*

Preliminary to an application of Rules 702-703 to the evidentiary rulings at issue, we must address the question of the proper scope of review. Although review of the district court's fact findings that undergird its rulings on the admissibility of expert opinion is deferential, given the enormous power of the district court to foreclose submission of a party's case to a jury on the basis of a threshold determination of nonreliability of opinion evidence, we conclude that the review requires a "hard look" to insure that the district court's exercise of discretion was sound and that it correctly applied the several *Daubert* factors. Then to the extent that any of the expert opinion survives, we must determine whether the plaintiffs can avoid summary judgment on any of the claims to which the surviving opinion pertains.

For the most part we affirm the rulings and the judgment of the district court. However, we also reverse in part, and remand some claims for trial. In summary we rule as follows:

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3. We reverse the district court's exclusion of the opinion of Dr. Janette D. Sherman insofar as it was grounded on the conclusion that she was an unqualified expert. However, we affirm the district court's holding that she could not rely on immunological tests from an unaccredited laboratory. We also affirm the district court's exclusion of the opinions of Dr. Sherman as to causation of plaintiffs' present injuries with respect to those plaintiffs whom she did not examine and whose medical history she did not take. We believe that, in the absence of employment of the standard techniques of differential diagnosis, and in the absence of any good explanation justifying her conclusion in the light of possible alternative causes of plaintiffs' injuries, Dr. Sherman's methodology as to those plaintiffs was not reliable, as the district court found.

* * * *

5. We reverse the district court's exclusion from evidence of the opinions of Dr. Sherman with respect to most of the injuries of Bessie Cunningham and Amber Burrell, whom she actually examined and whose medical histories she took. In light of: (1) Dr. Sherman's employment of the standard techniques of differential diagnosis with respect to those plaintiffs, and (2) defendants' failure to point to possible alternative causes of their injuries which Dr. Sherman failed to consider, we are satisfied that, with respect to them, Dr. Sherman's scientific methodology was reliable and that the district court's exclusion of her opinion represented an impermissible jury-like determination that it preferred the defendants' experts' opinion to that of Dr. Sherman.

* * * *

7. We reverse the district court's exclusion of the remainder of Dr. Nisbet's opinion, including his conclusion that plaintiffs had PCBs in their blood at levels above the background PCB levels in the general population. We are satisfied that Dr. Nisbet's calculation of background blood levels from National Human Adipose Tissue Survey ("NHATS") fat data was based on a reliable

methodology, and that the NHATS data was a type of data reasonably relied on by experts.

8. We reverse the district court's exclusion of animal studies. Where, as here, these studies were supported by some epidemiological data and had been used by EPA to conclude that PCBs were a probable human carcinogen, plaintiffs' experts had good grounds for determining that they "fit" a conclusion regarding human causation.

* * * *

10. We reverse the grant of summary judgment with respect to those personal injury plaintiffs for whom Dr. Sherman's testimony is admissible, concluding that they have demonstrated the existence of a genuine issue of material fact as to whether defendants exposed them to PCBs which caused their present injuries.

11. We reverse the grant of summary judgment with respect to the medical monitoring claims. Although recent changes in Pennsylvania law have interred plaintiffs' increased risk claims, we still believe that the Pennsylvania Supreme Court would recognize the plaintiffs' medical monitoring claims, and are satisfied that Dr. Sherman's testimony as to the plaintiffs' future risk is sufficient to get them over the summary judgment threshold.

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C. *Standard of Review*

A district court's ruling on admissibility of evidence is reviewed for abuse of discretion, "but to the extent the district court's ruling turns on an interpretation of a Federal Rule of Evidence our review is plenary." *De Luca*, 911 F.2d at 944. The threshold rule is, of course, one of deference. However:

> the justifications for committing decisions to the discretion of the court are not uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally

> framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981). In several other areas, we have applied a heightened abuse of discretion review. *See, e.g., Brody v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992) ("We review a denial of a motion to intervene as of right for abuse of discretion, although this review is 'more stringent' than the abuse of discretion review we apply to a denial of a motion for permissive intervention"); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir.), *cert. denied*, 484 U.S. 947, 108 S. Ct. 336 (1987). Under the *Harris* standard, a denial of intervention as of right should be reversed if the district court applied an improper legal standard or reached a decision that we are confident is incorrect." (internal quotation omitted)); *United States v. Miele*, 589 F.2d 659, 667 (3d Cir. 1993) (looking rigorously to see whether the district court had closely scrutinized drug quantity when the court based its decision on the statements of an addict-informant); *cf. Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983) (holding that while a court of appeals normally reviews a class action settlement for abuse of discretion "this principle [of deference] applies with less force when, as here, settlement of a class action has been negotiated before the class has been certified.").

While evidentiary rulings are generally subject to a particularly high level of deference because the trial court has a superior vantage point to assess the evidence, *see Criden*, 648 F.2d at 818, evaluating the reliability of scientific methodologies and data does not generally involve assessing the *truthfulness* of the expert witnesses and thus is often not significantly more difficult on a cold record. Moreover, here there are factors that counsel in favor of a hard look at (more stringent review of) the district court's exercise of discretion. For example, be-

cause the reliability standard of Rule 702 and 703 is somewhat amorphous, there is a significant risk that district judges will set the threshold too high and will in fact force plaintiffs to prove their case twice. Reducing this risk is particularly important because the Federal Rules of Evidence display a preference for admissibility.[20] *See Daubert*, 113 S. Ct. at 2794.

Factors like those just discussed influence the scope of our review of a district court's discretion. For example, where rules display a preference for a particular outcome, our review of decisions under those rules is sometimes more searching. *See United States v. Pennsylvania Department of Envir't Resources*, 923 F.2d 1071, 1074 (3d Cir. 1991) ("[T]he traditional discretion of the federal courts to decide whether to hear declaratory judgment cases is not limited by *Colorado River* and *Moses H. Cone*, but will be subject to the liberal interpretation to be accorded the Declaratory Judgment Act. Given our correspondingly enlarged scope of review . . ., the district court's declination to exercise jurisdiction . . . is not consistent with a sound exercise of judicial discretion." (internal quotation omitted)). Moreover, the likelihood of finding an abuse of discretion is affected by the importance of the district court's decision to the outcome of the case and the effect it will have on important rights. *See Maroquin-Manriquez v. Immigration and Naturalization Service*, 699 F.2d 129, 134 (3d Cir. 1983) (abuse of discretion will only be found in discovery if there has been interference with a substantial right or fundamental unfairness at the trial has resulted.); *cf. Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 902 (1976) (the procedural safeguards required by due process increase as the importance of the decision being made increases).

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[20] Indeed, a similar gloss may be gleaned from the Seventh Amendment's guarantee of a right to a jury trial when a party with a legal claim demands one.

We acknowledge that there is arguably a tension between the substantial deference normally accorded to rulings where the trial court has a superior vantage point and the preference for admissibility of the Federal Rules of Evidence. We resolve any such tension by holding that when the district court's exclusionary evidentiary rulings with respect to scientific opinion testimony will result in a summary or directed judgment, we will give them a "hard look" (more stringent review, *cf. Brody v. Spang*, 957 F.2d at 1115) to determine if a district court has abused its discretion in excluding evidence as unreliable.[21]

* * * *

[21] Of course, it remains true that if the scintilla of evidence presented is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, *see* Fed. R. Civ. P. 50(a), and likewise to grant summary judgment, Fed. R. Civ. P. 56.

ADDENDUM B

Federal Rules of Evidence

Rule 104

Preliminary Questions

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 401

Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402

Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 701

Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Rule 702

Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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Rule 703

Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.